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Dr Anca Chirita – Written evidence (CMP0013)

General

Question 1: What should competition policy in the UK set out to achieve?

1. UK competition policy should make domestic markets work better for the benefit of a broadly defined range of consumers, but mostly final consumers, i.e., citizens. First, it should accelerate vigorous competition enforcement against anti-competitive agreements and abuse of dominant and, foremost, oligopolistic market positions; and it should deal with potentially harmful mergers that have an impact on UK markets. Second, it should resist the temptation to govern markets through self-inflicted harmful protectionist measures, such as state aid or domestic subsidies favouring domestic producers and such like.

2. The ideal scenario following the UK's departure would be to maintain the current status quo in terms of UK competition policy: (i) driving economic growth through affordable prices for high quality and innovative products and/or services and (ii) becoming better enforcers of competition laws, namely, the UK Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013. I believe that an industrial strategy that attempts to keep a handful of failing businesses alive or, indeed, active in the UK through the issuance of comfort letters, potentially discriminatory subsidies, and financial contributions will all have a negative impact on domestic competition based on an inefficient allocation of resources and, in the long-run, will discourage foreign investment in the UK.

3. In an undesirable scenario of the UK defaulting on World Trade Organization rules, the UK is, nonetheless, bound by the Agreement on Subsidies and Countervailing Measures so that any potential subsidies granted to a domestic enterprise or industry, or group of enterprises or industries, are either prohibited or actionable. I would not engage with further details at this stage, given that I do not know whether there is going to be a trade deal. Suffice it to say that the EU's official position is that, in the first instance, there will be a withdrawal agreement only, not a trade deal.

What guiding principles should shape the UK's approach to competition policy after Brexit?

4. I assume that there will definitely be a withdrawal agreement concluded some time by the end of March 2019. EU27 has a population of nearly half a billion, so applying the English contract principles means that the EU enjoys a stronger bargaining power, and the UK cannot play by its own 'competition' rules. In other words, the UK competition policy cannot reinvent itself from scratch to implement the UK's own industrial strategy. A favourable trade deal for the UK is inseparably linked to an obligation by the UK to do nothing that could distort competition within the EU's Internal Market so that dumping prices, tax incentives, and any form of national protectionism (meaning any favourable treatment of domestic producers and such like) will not be acceptable. I could, of course, reiterate that the following essential principles: maintaining the *convergence* and *coherence* of UK competition policy will be essential to secure such a deal. Therefore, UK competition rules cannot depart significantly from previous domestic competition acts (1998 and 2002/2013), so this government

should make sure that the process of copy-paste runs smoothly and that absolutely nothing is unnecessarily cut from the text of our existing domestic competition laws; e.g., maintaining formalistic but legally renewable block exemption regulations could enhance legal certainty for businesses until the CMA engages with various stakeholders and decide their future.

5. Should it become very clear that there will be *no* trade deal after 2021, including a two-year transition period, something, which I personally doubt, there will still be plenty of time to make any necessary alterations. In such an optimistic scenario, the CMA will have to maintain its current competition enforcement in line with that of the EU Commission in the spirit of *mutual cooperation*. Maintaining the status quo will also benefit businesses that do not have to comply with different rules, so any statement to this effect by the CMA will only reinforce *legal certainty* and nurture the UK's *predictable competition regime* following its withdrawal from the EU.

Antitrust

Question 2: Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law?

6. For the UK's competition enforcement, the principle of *consistency* remains essential to maintaining current standards of convergence with EU competition law. If the intention is to simply incorporate the same body of competition rules into existing British statutes but interpret them differently, this could create uncertainty for businesses. Businesses already have certain expectations under EU competition law that a particular kind of conduct will be dealt with in a particular way, but will find that the UK's approach could be radically different. In my opinion, UK courts will still have to observe the future interpretation given to EU competition rules and the previous case-law. A pragmatic approach will be that CMA and UK courts will not depart from the previous jurisprudence without reasonable and good cause, that is to say, for the sake of originality, but for the case where there will be a manifest error of assessment. Depending on the kind of status the UK might achieve by 2021 and the time UK enforcers will take to move away from the previous case-law, it would be pragmatic to recognise under S 60 of the UK Competition Act 1998 that 'EU case-law previously relied upon by the CMA in its decisional practice and by the UK courts will remain binding precedents until further notice'. This approach can only benefit the addressees of competition rules, i.e., businesses that need to function in a climate of *predictability* with foreseeable guidance.

7. As an academic, I should also stress that the UK body of competition decisions and case-law is insufficiently developed. Most commentators have focused with constructive criticism on what the EU Commission has done well and not so well. There is very little to learn from the UK, so turning our back on EU competition law might not be wise at all. Learning from it cannot harm either. There is an increasing international trend towards greater convergence of competition rules, so adopting sensible pathways to ensure trans-Atlantic and European consistency of enforcement outcomes could only benefit the UK's competition regime post-exiting the EU.

What opportunities might greater freedom in antitrust enforcement afford the UK?

8. Freedom is beneficial only if it is properly understood. If an EU case-law is flawed, it can, and should, be overruled. The EU is not formally bound by common law precedent, but displays the same technical formalism so that previously held positions are rarely departed from in the jurisprudence. Greater freedom when applying the same body of competition rules should not end up with businesses being given a more lenient treatment and consumers having to pay higher prices for lower quality products or services. I would argue that the real deal on freedom will be one where we are not talking about enforcement alone, which is the application and interpretation of competition rules, but freedom to determine the rules that are to be applied.

9. Let me respond by asking what the CMA did with its own freedom under EU Regulation 1/2003, namely, Article 3 (2), final sentence: 'Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'. It is well-known that some Member States have had more detailed provisions. The UK has notably had the criminal cartel offence, but just seven cases have been brought since 2008.

Question 3: Will Brexit impact the UK's status as a jurisdiction of choice for antitrust private damages actions?

10. Private enforcement of competition law needs to be strengthened if the public enforcement by the CMA remains unsatisfactory or the CMA is simply unable to intervene due to its limited public resources; it is costly, as it shifts the cost of litigation from public enforcement funded by taxpayers to individuals with a legitimate concern. One cannot know in advance the answer to this question. It is tempting to guess that the UK will no longer be the preferred jurisdiction. But the same could happen to the default contract law rule of dealing with contractual disputes not in England and Wales, but elsewhere in the EU.

Question 4: Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?

11. Post-Brexit, there will be separate jurisdictions – this depends on the withdrawal agreement – and therefore, parallel investigations will inevitably occur, but there is nothing wrong with conducting parallel investigations provided that at least one competition authority – the CMA or the EU Commission – can defend a proper fining decision before the courts if there is judicial review. Having two watchdogs instead of one can only benefit consumers if at least one of the competition authorities does a good job: detecting and punishing anti-competitive conduct. Article 3 (1) of Regulation 1/2003 is modelled with this thinking in mind, as it expects the CMA and the UK courts to apply both domestic and supra-national competition law where there is an impact on cross-border trade. The UK becoming a third-country for the EU means that both competition authorities will have jurisdiction to investigate a competition case, e.g., a secret cartel. As Regulation 1/2003 will no longer

apply, any form of cooperation concerning the sharing of confidential information during such investigations should form part of the withdrawal agreement on competition. The current position is that the EU Commission can intervene in foreign markets in the area of mergers. The current threshold of intervention by the CMA, should it be amended following the Repeal Bill, could mean that the UK could follow the same approach to intervene in the EU market if there is an impact on trade within the UK and vice-versa. As Regulation 139/2004, as amended by Implementing Regulation 1269/2013, will also cease to apply, then in the absence of a withdrawal agreement on merger notifications, the UK could increase its upper threshold for mergers. At present, the CMA has sought to reduce the burden of notifications for mergers of insignificant economic importance.

12. A possible solution is to remedy this in the Enterprise and Regulatory Reform Act 2013 giving the CMA sole discretion to decide, based on the particular facts of a given case, whether to intervene. Another option is to agree with the EU Commission on the conduct of such investigations and any forms of future cooperation.

13. A direct implication for the CMA is having a higher caseload and, judging by the higher number of pending investigations at present, an increasing overload. An immediate implication is that the EU Commission will no longer fund public enforcement of competition rules that could benefit the UK. Finally, this is a massive opportunity for the CMA to hire talented competition lawyers and for UK taxpayers to contribute towards better competition enforcement in the UK, as prioritisation of competition cases will be done in London, not Brussels.

14. Implications will not be so dramatic for the CMA if public funds are made available for the hiring of such expertise. Businesses, however, might need to sort out more paperwork in their own time and at their own expense. However, the latter is not something for consumers to worry about.

Question 5: Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?

15. A cooperation agreement for the purpose of detecting anti-competitive conduct, sharing confidential information, facilitating access to cross-border evidence, mutually recognizing enforcement remedies and court rulings, reducing the administrative burden of dual notification of a proposed merger, or even not having to apply for leniency twice – once in London and again in Brussels - will all be essential for the new UK competition regime and its international standing and reputation. Given the CMA's previous longstanding close ties with the EU Commission's Directorate-General for Competition, it would be difficult to envisage going forward without a future cooperation agreement following the UK's withdrawal. In a withdrawal agreement, however, there should be simple clarifications regarding the cut-off date from which dual antitrust investigations or merger notifications will apply and, in the case of pending investigations, whether these will not eventually be deferred to the UK or simply carried out as usual business. A simple provision could be inserted saying that pending cases will follow their current course, but future case will be referred to the CMA.

Question 6: How will Brexit affect the CMA's ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK's influence in developing global competition policy?

16. I cannot see the CMA's ability to cooperate outside of the EU, in the International Competition Network or the OECD, to be jeopardised in any way post-Brexit, but there might be an impact on the UK's influence in developing a truly 'global' competition policy. The CMA will have lost an insider seat in the European Competition Network of 27 European states. In my view, the CMA's rather modest track record of domestic cases has to be developed further to stand on a par with that of the EU Commission or of the US Federal Trade Commission. Unfortunately, I cannot see how the CMA could be strengthened internationally without massive investment in its own staffing post-exiting.

Question 7: Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK's withdrawal from the EU? If so, what transitional issues would such arrangements need to address?

17. A transitional arrangement should reach an agreement about how to continue any pending investigations and court proceedings given that competition cases take notoriously long to come to be dealt with. There is an important issue of legitimate expectations for businesses caught up in the middle, and possibly, it will be best for the parties concerned to have a choice of applicable laws, i.e., referrals back to the CMA, CAT, or HC. It could also decide the fate of existing British nationals working for DG COMP or EU courts should they wish to relocate to London given the CMA's imminent increased workload with its 'sole' competition jurisdiction.

Mergers

Question 8: What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?

18. Article 21 (4), second sentence, of the EU Regulation 139/2004 contains a provision favouring public interest mergers which makes it possible to block unwanted mergers to defend 'public security, the plurality of media and prudential rules'. An equivalent domestic provision is s 58 of the UK Enterprise Act 2002, which is more detailed and so includes national security, media quality, plurality and standards, and financial stability, and therefore, has often been used quite successfully to preserve the integrity and choice of available media enterprises. The latter falls broadly under the heading of 'public security'. A UK concrete addition is maintaining the stability of the UK financial system; thus, this is arguably included under the European wider provision of 'prudential rules'. I believe that this public policy clause is very useful; it is a credit to the CMA to have used it successfully in the past, and it could only continue to do so in future to avoid misleading the wider public through deceptive, fake news by private oligopolistic or monopolistic media trusts in the UK which could engage in one-party political propaganda. This is just one example that shows how both

domestic and supra-national/EU competition regimes have complemented each other.

Question 9: Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?

19. This is something that only the CMA could say; however, an increased workload could, potentially, place strains on the CMA's available human resources, and for the CMA to continue operating within the same parameters of very tight deadlines, it might be sensible to either (i) relocate existing British civil servants working for DG COMP to London, should they so wish, or (ii) start recruiting more case handlers in preparation for the take-over period so they are already in place before the transitional period starts. Sectoral regulators are useful, too, but not all mergers will touch upon gas, electricity, and communications markets only. It might also be that should there be economic downturn, the level of foreign investments will reduce the appetite for internal growth through mergers and acquisitions activity. In the case of an economic crisis, however, failing firms could be even more interested in merging activities with larger viable businesses. However, one cannot make accurate predictions at this stage; beyond macroeconomic indicators of economic performance, all depends on the markets affected and how the CMA will prioritise its future cases.

Question 10: How burdensome would dual CMA/European Commission merger notifications be for companies?

10. I would say that one has to be careful about what 'dual' notification could mean in practice since we do not know yet whether the UK will secure a trade deal within the internal market or else be treated as a foreign market for the EU. In the first scenario, referrals might well remain in place, so duplication of effort is best avoided. The current system allows the EU Commission itself to refer back to the CMA any merger that threatens to affect significantly competition within the UK market. The new system could mean that such mergers could be ruled out at the end of Phase I investigations as being beyond the scope of the EU Merger Regulation 139/2004. The parties concerned will have to notify the CMA of the merger before its implementation. However, based on current statistics, there are overall 332 accepted referrals for EU28 out of a total of 6,684 notifications. This represents fewer than 5% of all notified mergers over a period of 28 years of EU merger control. It could be that the UK will have to take over in time an additional burden of 11 to 20 cases. No one can predict the exact number of filings required, but a possible solution could be the administrative cutting of lengthier forms. Such forms have recently been simplified; however, these remain notoriously tedious and long for businesses, but a lucrative bonus for lawyers.

Question 11: How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?

11. I would say that divergent outcomes are a myth inspired by a few divergent merger decisions reached by the EU Commission and US FTC in the past. The

substantive tests under EU and UK merger control are, however, convergent and economics-based. A divergent outcome means that a proposed merger will be blocked for competition concerns, instead of going ahead. There are only 27 cases of blocked EU mergers, which is 0.4% of all notifications, so the possibility that this fractional figure could affect implementing a merger in the UK remains very low, in my view. The reason for arriving at different decisions is that different markets require different strategies so that a merger could eventually benefit competition in one market, but affect competition in another.

Question 12: Do either the CMA or the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?

12. Outside the remit of the European Competition Network, the International Competition Network could provide a forum for reaching a multilateral agreement on mutual cooperation depending on the ramification of merger notifications and the impact on a number of foreign markets and jurisdictions. Post-Brexit, the UK will have to reach similar bilateral agreements on mutual cooperation with other competition authorities worldwide with which the CMA presently cooperates and/or has close economic ties.

Question 13: Will it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK's departure from the EU? If so, what transitional issues would such an arrangement need to address?

13. Transitional arrangements should provide certainty for businesses that have notifications pending review by the EU Commission or Courts on continued jurisdiction or any potential referrals and the expected cut-off date of phased transition, recognition of remedies, and monitoring of commitments, as well as mutual judicial recognition of decisions and judgements.

State Aid

Question 14: Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?

14. Taking as an example the 1985 trade agreement between the EU and China, there is no agreement on state aid rules, as far as we know, but there is mutual recognition for a most-favoured-nation treatment regarding custom duties, clearance, transit, taxes, and other levies. Meanwhile, China has demonstrated its commitment to adopt similar competition rules, including antitrust and mergers. Taking the example of the UK's close geographical proximity and benefits obtained from EU state aid policy, it would be in the economic, social, and cultural interest of the UK to negotiate aid for natural disasters or exceptional circumstances; regional aid to alleviate poverty, such as a lack of local jobs; or aid necessary to preserve UNESCO sites and heritage. In the absence of any agreement of this kind, the UK government will have to come up with its own funding figure.

Question 15: Will the UK require a domestic state aid authority after Brexit?

15. No, governmental action to supply funding would suffice. The same goes for Too-Big-to-Fail banks in the event of an economic crisis; then, the UK government should inject monies into banking or best allow such inefficient banks to exit the market.

Question 16: What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK's ability to support industries, or individual companies, through favourable tax arrangements?

16. I have now run out of space. Briefly, if the UK were to offer certain groups of individuals or industries more favourable tax arrangements, this could trigger a WTO dispute settlement mechanism, provided that the purpose of such an arrangement is in the form of a financial contribution by the UK government or another public body. A fiscal incentive, even without any governmental expense paid by the UK, could nevertheless distort competition and still be considered to be a WTO subsidy. Given that the subsidy in question would be paid to a certain group of individuals or industries only, that subsidy would be considered as a 'specific' one under the WTO Agreement on Subsidies and Countervailing Measures. As someone who, a long time ago, acquired a master's specialising in WTO law, I would caution against defaulting on WTO rules with the sole purpose of acting in a protectionist fashion, not least because all WTO agreements are historically the true foundation of competition rules on a truly global scale on the basis of open market access, elimination of barriers, and the principle of non-discrimination. Yet, there is no multilateral agreement that details such competition rules; thus, the whole is the sum of its parts. The EU Commission, however, has moved from a historic understanding of state aid to an international dimension that covers intervention by the state through grants, interest and tax relief, guarantees, and so on. This makes it highly likely that the EU will action the UK before Appellate Bodies in the event that competition is distorted, as UK goods or services will inevitably affect EU markets. There will be no escape through WTO subsidies rules given that even the state aid granted by the Irish government to Apple found no special protection inside the EU itself.

Question 17: How will the Government's industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission's state aid policy limited interventions that the UK Government may have otherwise pursued?

17. Industrial strategy is more popular with failing businesses than with those competing on their own merits. Any governmental intervention will allocate available resources on the basis of pre-determined criteria that could favour only a few market players. The effect on the market could be assessed only retrospectively, not prospectively. Let's assume that the UK had continued to subsidise its mining sector despite moving away from coal heating. An inefficient allocation of resources would have continued to distort competition in the market for alternative sources of energy and to damage our environment. An industrial strategy favouring this particular industry and its enterprises would, indeed,

have avoided massive unemployment, but would have failed to address the lack of competitiveness of the industry in question. Thus, it is sensible to create new jobs and train the workforce in advance of dealing with business failures and employing populist industrial strategies. The government cannot bail out all the affected industries of the whole economy post-existing. Therefore, some industries will claim they are being discriminated against and will lack the incentives to boost their own productivity, knowing that others are receiving preferential financial benefits. While I am not a fan of the EU's state aid policy either, in particular of TBTF banks, I am sympathetic to noble causes, such as state aid for natural disasters, regional aid to combat poverty due to governmental inaction in creating new jobs and training people, and environmental and heritage conservation. So, it all depends on what kind of state aid the government wants to pursue post-Brexit.

Question 18: What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?

18. It is up to them to decide.

Question 19: Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK's withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?

19. A transitional arrangement on state aid should agree a cut-off date post-exiting for previous state aid granted to the UK and clarify whether the UK will continue to benefit from it following its departure until the end of the financial term agreed by the UK. It would be costly for the government to pay for something that it had financially committed to, but had to leave before having had the opportunity to spend such aid. Anyone in receipt of such aid that is not fully spent by the cut-off date could claim that a legitimate expectation indeed exists for the UK government to cover it.

14 September 2017